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# INDIAN TRUST FUND: RESOLUTION AND PROPOSED REFORMATION TO THE MISMANAGEMENT PROBLEMS ASSOCIATED WITH THE INDIVIDUAL INDIAN MONEY ACCOUNTS IN LIGHT OF *COBELL V. NORTON*

*Christopher Barrett Bowman*<sup>+</sup>

“I [had] never seen more egregious misconduct by the federal government, now at the conclusion of the second contempt trial, I stand corrected. The Department of Interior has truly outdone itself this time.”<sup>1</sup> These rather harsh comments were written by U.S. District Court Judge Royce C. Lamberth<sup>2</sup> in a recent opinion in connection with the litigation concerning the mismanagement of the Individual Indian Money (IIM) accounts.<sup>3</sup> In December 1999, Judge Lamberth ordered the federal government to initiate a major overhaul of the IIM account system and to render a historical accounting of these funds.<sup>4</sup> Eighteen months after the order, the situation “ha[d] barely improved.”<sup>5</sup>

It is estimated that between 300,000 and 500,000 Indians have been deprived of between ten and forty billion dollars as a result of over one

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1. Helen Rumbelow & Neely Tucker, *Interior's Norton Cited for Contempt in Trust Suit*, WASH. POST, Sept. 18, 2002, at A1. These comments were taken from an opinion citing Interior Secretary Gale Norton and assistant secretary for Indian Affairs Neal McCaleb with contempt of court for failing to abide by a three-year-old court order requiring the reformation of Individual Indian trust funds. *Id.* In February 1999, Judge Lamberth found then-Secretary of the Interior Bruce Babbitt and then-Secretary of the Treasury Robert Rubin in contempt of court for failing to meet court-ordered deadlines in connection with the production of documents pertaining to trust fund data. John Fialka, *Indians Again Ask Federal Judge to Cite Interior Secretary Babbitt for Contempt*, WALL ST. J., Aug. 17, 2000. As a result of this ruling, the United States was ordered to pay \$625,000 in fines to plaintiffs' lawyers and accountants. *Id.*

2. U.S. District Judge Royce C. Lamberth has been described as “one of the toughest judges around when it comes to public officials.” John Gibeaut, *Another Broken Trust*, 85 A.B.A. J. 40, 43 (1999).

3. Rumbelow & Tucker, *supra* note 1.

4. *Cobell v. Norton: An Overview*, at <http://www.IndianTrust.com/index.cfm?FuseAction=Overview.Home> (last visited Nov. 27, 2002); *Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001); *Cobell v. Babbitt*, 91 F. Supp. 2d 1 (D.D.C. 1999).

5. Rumbelow & Tucker, *supra* note 1.

hundred years of trust fund mismanagement by the federal government.<sup>6</sup> Since the 1880s, the federal government has held in trust royalties generated from tribal lands through mineral mining, grazing, timber, and oil drilling.<sup>7</sup> The government agency charged with managing and accounting for these royalties, the Bureau of Indian Affairs (BIA), has been accused of “mismanaging, diverting and losing money that belongs to Indians” for over one hundred years.<sup>8</sup> John Echohawk, director of the Native American Rights Fund, referred to the current situation as “yet another serious and continuing breach in a long history of dishonorable treatment of Indian tribes and individual Indians by the United States government.”<sup>9</sup>

Evidently a problem exists, as neither side has disputed the gravity of the situation.<sup>10</sup> This Comment examines the current state of the

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6. *Cobell v. Norton: An Overview*, *supra* note 4; Rumbelow & Tucker, *supra* note 1; Joel Dyer, *Billions Missing from U.S. Indian Trust Fund*, Albion Monitor/News, at <http://www.monitor.net/monitor/free/biatrustfund.html> (last visited Nov. 27, 2002); Kathleen Koch, *Native Americans: Government Breaking Promises Over Land Use Trust Fund*, at <http://www.cnn.com/2000/US/03/02/indian.trust.fund/> (Mar. 2, 2000).

7. Koch, *supra* note 6.

8. Dyer, *supra* note 6.

9. *Id.*

10. For purposes of this Comment, the opposing parties in this dispute will be considered the same as those currently litigating in *Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001). Plaintiffs in that case represent approximately 300,000 IIM beneficiaries who are demanding that the federal government render an accurate historical accounting of the IIM trust. *Id.* at 1086; Order Certifying Class Action at 1, *Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 1998) (No. 96-1285). The plaintiffs specifically contend that defendants (the U.S. Departments of the Interior (DOI) and Treasury) have failed in their capacity as trustees with respect to the following issues:

(a) They have failed to keep adequate records and to install an adequate accounting system, including but not limited to their failure to install an adequate accounts receivable system;

(b) They have destroyed records bearing upon their breaches of trust;

(c) They have failed to account to the trust beneficiaries with respect to their money;

(d) They have lost, dissipated, or converted to the United States' own use the money of the trust beneficiaries; and

(e) Defendants . . . have prevented, and combined and conspired with others to prevent, the Special Trustee for American Indians, appointed pursuant to the American Indian Trust Fund Management Reform Act of 1994 (“the 1994 Act”), P.L. 103-412, 108 Stat. 4239, codified to 25 U.S.C. §§ 4001-4061, from carrying out duties and responsibilities conferred upon him by law to correct their unlawful practices and procedures with respect to IIM accounts. Complaint to Compel Performance of Trust Obligations, June 6, 1995, (D.D.C. 1995).

*Id.* Conversely, defendants hold that they are actively fulfilling their trust responsibilities as defined in the 1994 Reform Act, and are taking the appropriate steps toward reconciling the IIM accounts in light of the prior mismanagement. See Comment by Steve Griles, Deputy Secretary, U.S. Department of the Interior, concerning Indian Trust Fund reform, at <http://www.doi.gov/indiantrust/> (last visited Nov. 27, 2002).

Individual Indian Money accounts and the specific problems associated with reformation of this system. By analyzing the federal government's trustee/beneficiary relationship with the Individual Indian Money beneficiaries, a number of concerns arise. The 1994 Reform Act and the current state of the *Cobell* lawsuit provide an analysis of the problems associated with the IIM accounts. This Comment considers the historical relationship between the federal government and Native Americans in light of the current trust relationship and provides insight into how and why this relationship has deteriorated to its current state. This Comment analyzes several proposed solutions to the problems and assesses their viability. Finally, this Comment concludes that the measures necessary to reach any type of beneficial resolution will come first, through settlement and second, through the creation of a receivership, which will monitor the reformation process until it has concluded in the development of a functional trust system.

#### I. LEGISLATIVE AND COMMON LAW ROOTS OF THE TRUST RELATIONSHIP

For the better part of the nineteenth century, United States policy toward Native Americans focused primarily on removal and relocation.<sup>11</sup> In the 1880s, this policy shifted to one of assimilation.<sup>12</sup> The primary

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11. FRANCIS PAUL PRUCHA, DOCUMENTS OF UNITED STATES INDIAN POLICY 154-155 (3d ed. 2000) (providing numerous pieces of legislation aimed at removal and relocation of Native American tribes off of their Native lands). See Indian Removal Act, May 28, 1830, pg. 52; President Jackson on Indian Removal, Dec. 7, 1835, pg. 70; Indian Commissioner Lea on Reservation Policy, Nov. 27, 1850, pg. 81. The Cherokee cases provide the most clear context of removal. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). This case concerned a situation in which the state of Georgia had given up claims to western lands in exchange for a federal guarantee that Native American land titles within Georgia would be extinguished. WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW: IN A NUTSHELL 14 (3d ed. 1998). In response to the federal government's failure to act on its promise, Georgia enacted a series of laws that attempted to undercut the sovereignty of the Cherokee nation. *Id.* In taking its case to the United States Supreme Court, the Cherokee nation was deemed by Chief Justice Marshall as a "domestic dependent," which in turn provided for a "doctrinal basis for protection of the tribes by the federal government." *Id.* at 15-16. However, the Court's holding provided little support for the Cherokee cause in light of President Andrew Jackson's commitment to remove Native Americans to the West. *Id.* at 15. By 1835, President Jackson's policy of "removing the aboriginal people who yet remain within the settled portions of the United States to the country west of the Mississippi River" was already in progress. See President Jackson on Indian Removal, December 7, 1835, in DOCUMENTS OF UNITED STATES INDIAN POLICY, at 70-72 (Francis Paul Prucha, 3d ed. 2000) [hereinafter DOCUMENTS]. The concept of relocation focused primarily on the establishment of reservations that were designed to separate Natives and non-Natives in order to assure peace between them. CANBY, *supra*, at 18-19; see *infra* note 12.

12. See Indian Commissioner Price on Civilizing the Indians, Extracted from the Annual Report of the Commissioners of Indian Affairs, Oct. 24, 1881, in DOCUMENTS,

objective was “to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into [the] society at large.”<sup>13</sup> Under the Indian General Allotment Act of 1887, sometimes referred to as the Dawes Act, the federal government, in an attempt to further the assimilation process, provided for conversion of tribal lands into individual allotments that would vest to individual Indians with the United States as trustee.<sup>14</sup> The Dawes Act provided that the federal government would hold the allotments of land in trust for a minimum of twenty-five years, and then, at the conclusion of that time period, a fee patent<sup>15</sup> would be granted to individual Indian allottees.<sup>16</sup> During this “trust period” the government was responsible for implementing and managing accounts for each individual Indian.<sup>17</sup> Government approval was required if Indians wanted to sell, lease, or otherwise burden their

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*supra* note 11, at 154-55. Commissioner Price’s comments primarily focused on a policy of assimilation whereby “the laws that govern a white man govern the Indian.” *Id.* at 155. Price’s comments also foreshadow a number of problems currently seen with respect to the IIM accounts. Commissioner Price stated:

To domesticate and civilize wild Indians is noble work . . . which should be a crown of glory to any nation. But to allow them to drag along year after year, and generation after generation, in their old superstitions, laziness, and filth, when we have the power to elevate them in the scale of humanity, would be a lasting disgrace to our government.

*Id.* at 154.

13. *Yakima v. Yakima Indian Nation*, 502 U.S. 251, 254 (1992).

14. Indian General Allotment Act of 1887 (Dawes Act), ch. 119, 24 Stat. 388 (1887), amended by 25 U.S.C. § 331.

15. The fee patent is described as “a grant of land from the public domain (that is, public land holdings) by the federal or state governments.” GARY A. SOKOLOW, *NATIVE AMERICANS AND THE LAW: A DICTIONARY* 90 (2000). With respect to the General Allotment Act, the fee patent refers to the “issuance of a deed, or title, to land formerly held by the U.S. government, to individual members of an Indian Tribe.” *Id.* By the early 1900s, the use of the “forced fee patent” by the federal government became widespread in an attempt to further “civilize” the Native American tribes. *Id.* at 90-91. The “forced fee patent” was utilized by a federal competency commission (acting on behalf of the Secretary of the Interior) as a means of removing the trust status of Native American lands. *Id.* at 91. If the federal competency commission made the determination that an individual allottee was capable of handling its business affairs, it would declare that land to be held in fee patent by the individual allottee, regardless of whether the allottee wanted it. *Id.* When a fee patent was granted, that land would then become subject to the same local “regulations, mortgages, and taxation” to which ordinary parcels of land were subject. *Id.*

16. SOKOLOW, *supra* note 15, at 90-91; *Cobell v. Norton*, 240 F.3d 1081, 1087 (D.C. Cir. 2001).

17. *Cobell*, 240 F.3d at 1087. Today these accounts, which serve as the focal point of this Comment, are referred to as Individual Indian Money (IIM) accounts. SOKOLOW, *supra* note 15, at 145. Income generated from the sale or lease of allotments—as well as revenues generated from the sale of oil, gas, timber, mineral resources, and the like—is deposited in trust with the federal government for the benefit of individual Native Americans. *Id.*

lands.<sup>18</sup> Under the Dawes Act, about two-thirds of all Indian land was removed from Indian ownership.<sup>19</sup> By 1934, it had become evident that the concept of assimilation and the accompanying allotment process was not successful and further reformation of the U.S. Government-Native American relationship was necessary.<sup>20</sup>

#### A. First Attempts at Reform: Indian Reorganization Act of 1934

The Implementation of the Indian Reorganization Act of 1934 ("IRA") concluded the process of allotting to individual Indians and provided that those lands that had not yet been allotted would be returned to tribal ownership.<sup>21</sup> The lands allotted prior to the enactment of IRA would remain in trust with the United States indefinitely.<sup>22</sup> Moreover, the U.S. District Court for the District of Columbia noted in *Cobell v. Norton* that "[t]he federal government retained control of lands already allotted but not yet fee-patented and thereby retained its fiduciary obligations to administer the trust lands and funds arising from those lands for the benefit of individual Indian beneficiaries."<sup>23</sup> These lands, and the funds arising therefrom, are the focal point of the controversy and form the basis of the IIM accounts.<sup>24</sup>

#### B. Formation of the Modern Day Trust Relationship

##### 1. Seminole Nation v. United States: Growth of the United States' Fiduciary Duties

In 1942, the nature of the trust relationship between the United States and Native Americans took another turn. In *Seminole Nation v. United States*,<sup>25</sup> the Supreme Court held that the United States trust relationship with Native Americans encompassed a fiduciary responsibility with

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18. *Cobell*, 240 F.3d at 1087.

19. *Id.* See *supra* note 15 for a discussion of the effects of the "forced fee patent."

20. Billee Elliot McAuliffe, *Forcing Action: Seeking to "Clean Up" the Indian Trust Fund*: *Cobell v. Babbitt*, 30 F. Supp. 2d 24 (D.D.C. 1998), 25 S. ILL. U. L.J. 647, 652 (2001) ("In 1934, Congress, realizing that the GAA process of giving the Indians the land in fee simple was not reaching its objectives, enacted the Indian Reorganization Act of 1934.").

21. Indian Reorganization Act, 25 U.S.C. §§ 461, 463(a) (2000). This Act favored the approach of "releas[ing] the Indian tribes from federal supervision and terminat[ing] the government-Indian relationship." *Cobell*, 240 F.3d at 1087. This policy aimed specifically at "severing the . . . trust relationship." *Id.* (alteration in original) (quoting *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 8 (1999)).

22. *Cobell*, 240 F.3d at 1087.

23. *Id.*

24. *Id.*; see *supra* note 17.

25. *Seminole Nation v. United States*, 316 U.S. 286 (1942).

respect to its management of the Indian Trust Fund.<sup>26</sup> *Seminole Nation* arose out of claims by tribal members that tribal leaders were misusing the disbursement of trust fund monies.<sup>27</sup> The United States Supreme Court did not rest at merely establishing the existence of a fiduciary relationship, but went on to state that:

[T]his Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people. In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.<sup>28</sup>

This demanding standard placed on the federal government in its role as trustee provided the benchmark for what is to be expected from the federal government in its dealings with Native Americans.

## 2. *The Indian Self-Determination and Education Assistance Act of 1975*

The Indian Self-Determination and Education Assistance Act of 1975 represents the current policy of “self-determination and self-governance” and “authorizes tribes to assume some of the management functions currently imposed on the Bureau of Indian Affairs (“BIA”) and Office of Trust Fund Management.”<sup>29</sup> In particular, a tribe may contract with BIA to manage trust accounts, including the IIM accounts, for the tribe or its members.”<sup>30</sup> The BIA is charged with ensuring that

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26. *See id.* at 296-97.

27. *Id.* at 295 (discussing reports from the Dawes Commission “that the governments of the Five Civilized Tribes were notoriously and incurably corrupt, that every branch of the service was infested with favoritism, graft and crookedness”).

28. *Id.* at 296-97.

29. *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 9 (1999); Indian Self-Determination and Education Assistance Act (Jan. 4, 1975), in DOCUMENTS, *supra* note 11, at 275. The purpose of this Act was to “provide for the full participation of Indian tribes in programs and services conducted by the federal government.” *Id.* The Act further provides that the longstanding “federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people,” and in turn “has denied [Native American people] an effective voice in the planning and implementation of programs,” which were initially designed for their benefit. *Id.*

30. *Cobell*, 240 F.3d 1081, 1088 (D.C. Cir. 2001); DOCUMENTS, *supra* note 11 at 275. Section 104(a)(1) of the Indian Self-Determination and Education Assistance Act provides that:

contracting tribes possess sufficient “accounting or management capabilities” necessary to comply with a proposed contract.<sup>31</sup> If it is determined that the tribe lacks such capabilities, the BIA is authorized “to assist tribes in developing the necessary capabilities to manage IIM accounts themselves.”<sup>32</sup> As such, the fiduciary obligations of the BIA associated with trust account management mandate that the BIA be certain a tribe can meet its own fiduciary obligations prior to transferring control.<sup>33</sup>

### 3. *United States v. Mitchell (I & II)*

More than twenty years ago, the trust responsibilities of the United States began to take their current form.<sup>34</sup> In 1980, Native American allottees of the Quinault Tribe sued the federal government to recover damages resulting from the alleged mismanagement of timber resources on the Quinault Reservation.<sup>35</sup> In *United States v. Mitchell I*, the United States Supreme Court initially held that the General Allotment Act “created only a limited trust relationship between the United States and the allottee that does not impose any duty upon the government to

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The Secretary of the Interior is authorized, upon the request of any Indian tribe . . . to contract with or make a grant or grants to any tribal organization for . . . the strengthening or improvement of tribal government [including but not limited to, the development, improvement, and administration of planning, financial management, or merit personal systems . . . .”

*Id.* at 276.

31. *Cobell*, 240 F.3d at 1088; DOCUMENTS, *supra* note 11, at 276. Section 102(a) of the Indian Self-Determination and Education Assistance Act provides that the Secretary of the Interior may decline to enter into a contract with an Indian tribe if he determines:

(1) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory; (2) adequate protection of trust resources is not assured, or (3) the proposed project or function to be contracted cannot be properly completed or maintained by the proposed contract.

*Id.* Furthermore, in considering the proposed contract, the Secretary of the Interior is required to consider whether the tribe possesses adequate equipment, bookkeeping and accounting procedures, trained personnel, and other necessary components, which would enable it to perform under the contract. *Id.* If the Secretary determines that the contract is not feasible, then he must provide that tribe with information necessary to overcome any shortcomings, to allow for hearings, and to provide an opportunity to appeal any decision that has been made. *Id.*

32. *Cobell*, 240 F.3d at 1088.

33. *Id.*

34. McAuliffe, *supra* note 20, at 654-55.

35. *United States v. Mitchell*, 445 U.S. 535, 537 (1980). Specifically, the allottees asserted that the federal government failed to recover the fair market value for timber sold, did not rehabilitate the land after logging, charged excessive administrative fees to the allottees, and did not pay interest on certain funds. *Id.* at 537.



manage timber resources.”<sup>36</sup> Three years later, in *United States v. Mitchell II*,<sup>37</sup> the Supreme Court further clarified the issue, holding that although the General Allotment Act did not expressly state that the government owed a fiduciary duty to manage resources on Indian lands, a trust duty did arise from several prior statutes and regulations.<sup>38</sup> The Court held that even though it is not expressly stated in the underlying statutes, the government assumed the fiduciary obligations as trustee in connection with the individual Indian trust accounts.<sup>39</sup> The *Mitchell II* Court went on to explain that “a fiduciary relationship necessarily arises when the government assumes such elaborate control” over resources and revenues generated from Native American lands.<sup>40</sup>

*C. IIM Account-Related Fiduciary Responsibilities of the Federal Government: Department of the Interior, Treasury Department, and Bureau of Indian Affairs*

The Department of the Interior (DOI), and the Treasury Department (Treasury) play significant roles in the administration of the government’s trust responsibilities.<sup>41</sup> The primary role of the DOI is to oversee the trust responsibilities that are directly carried out by numerous sub-agencies.<sup>42</sup> These agencies include, but are not limited to, the BIA, the Office of Trust Fund Management (OTFM), and the Office of Special Trustee (OST).<sup>43</sup> Through these sub-agencies, the DOI is

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36. *Id.* at 542. The Court held that the General Allotment Act did not establish a fiduciary responsibility for the United States with respect to allotted lands. *Id.* at 545.

37. *Mitchell II*, 463 U.S. 206 (1983).

38. *Id.* at 225. The Court cited the Act of June 25, 1910, (which “empowered the Secretary [of the Interior] to sell timber on unallotted lands and apply the proceeds of the sales for the benefit of the Indians”); the Indian Reorganization Act of 1934, (which in part “imposed even stricter duties upon the Government with respect to Indian Timber management”); and the timber management statutes, 25 U.S.C. §§ 406, 407, and 466, (which “establish the ‘comprehensive’ responsibilities of the federal government in managing the harvesting of Indian timber”). *Id.* at 219-22.

39. *Id.* at 225. The Court explained that all the necessary elements of a common law trust existed: “a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds”). *Id.* See also *Navajo Tribe of Indians v. United States*, 624 F. 2d 981 (Cl. Ct. 1980).

40. *Mitchell II*, 463 U.S. 225.

41. *Cobell v. Norton*, 240 F.3d 1081, 1088 (D.C. Cir. 2001). The United States is considered trustee of the IIM accounts. *Id.* However, under current law, the Secretaries of the Interior and Treasury are considered the trustee-delegates. *Id.* “Each Secretary, or his designates has specific fiduciary responsibilities that must be fulfilled lest the United States breach its fiduciary obligations.” *Id.*

42. See *id.*

43. *Id.*

charged with the responsibility of maintaining an accurate account of all individual IIM trusts.<sup>44</sup>

The BIA,<sup>45</sup> under the authority of the DOI, is responsible for the management of trust lands, the approval of leases and transfers of land, and income collection.<sup>46</sup> Individual beneficiaries are paid income derived from trust lands either directly to their accounts, or to "special deposit accounts" where the money is not distributed directly to the individual.<sup>47</sup> The BIA is also charged with the duty to contract with the tribes for the management of the IIM accounts.<sup>48</sup> The BIA performed and approved the majority of transactions concerning the IIM accounts.<sup>49</sup>

The Treasury, in conjunction with the OTFM, holds and invests the IIM accounts and provides for accounting and financial management of the funds.<sup>50</sup> Treasury maintains a single IIM account for all IIM funds, whereas the OTFM maintains individualized accounts.<sup>51</sup> For accounting purposes, the OTFM utilizes the Treasury's accounting records to reconcile its own IIM records.<sup>52</sup>

## II. INDIAN TRUST FUND MANAGEMENT REFORM ACT OF 1994

*Misplaced Trust*, a 1992 report generated from a Congressional Oversight Hearing, placed a great deal of blame on the DOI and BIA for

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44. See *id.* Specifically, these sub-agencies are responsible for the approval of all lease and land transfers, income collection (i.e. deposits from land revenues), and the disbursement of money to the IIM account holders. *Id.*

45. Created without Congressional approval by Secretary of War John C. Calhoun, on March 11, 1824, the BIA was initially responsible for numerous financial activities associated with the Native American-U.S. relationship. C.L. Henson, *From War to Self-Determination: A History of the Bureau of Indian Affairs*, at <http://www.americansc.org.ukonline/indians.htm> (last visited Oct. 8, 2003). Responsibilities included: appropriations for annuities and current expenses, examination and approval of all vouchers for expenditures, administration of funding for the civilization of the Indians, and deciding claims arising between Indians and whites, as well as handling the ordinary Indian correspondence of the War Department. *Id.* The Bureau of Indian Affairs (BIA) is one of the oldest agencies in the U.S. government. *Id.* Congress transferred the BIA to the Department of the Interior in 1849. *Id.* Soon after this transfer came changes in responsibilities and policy. *Id.* During the assimilation era, one of the primary concerns of the BIA was the administration of allotments. *Id.*

46. *Cobell*, 240 F.3d at 1088.

47. *Id.*

48. *Id.*; see *supra* notes 29-31 and accompanying text.

49. See *Cobell*, 240 F.3d at 1088

50. *Id.*

51. *Id.* at 1089.

52. *Id.*

the poor state of the IIM trusts.<sup>53</sup> *Misplaced Trust* found “significant, habitual problems in BIA’s ability to fully and accurately account for trust fund moneys, to properly discharge its fiduciary responsibilities, and to prudently manage the trust fund have been well documented over the years.”<sup>54</sup> The report provided that, as a result of the widespread and invasive nature of mismanagement problems, the prospect for some type of substantial reform effort in the future was unlikely.<sup>55</sup> The Congressional Oversight Committee concluded in part that:

[C]lose congressional oversight and supervision of the Bureau of Indian Affairs and the Department of the Interior have failed to effect fundamental improvements in the Bureau’s management of the . . . Indian trust fund. The committee is skeptical that either the Bureau of Indian Affairs or the Department of the Interior will take the resolute action necessary to solve the structural problems that have besieged the financial management of the Indian trust fund for decades; that they will . . . develop a commitment to fulfilling their statutory role as a competent fiduciary and sophisticated trustee. Indeed the committee is skeptical that any reform package developed by Bureau personnel will be adequate to assure Congress, the public, or the native American community that the Department and the Bureau are committed to, and will be successful in, professionally competent financial management of the Indian trust fund or restoring the Bureau’s administrative credibility.<sup>56</sup>

In light of this critical assessment of the BIA and DOI’s handling of their trust responsibilities, the committee allowed for a “reasonable period of time for the Bureau of Indian Affairs and the Department of the Interior to show demonstrable improvement in the financial

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53. See generally Committee on Government Operations, *Misplaced Trust: The Bureau of Indian Affairs’ Mismanagement of the Indian Trust Fund*, H.R. REP. NO. 102-499 (1992). The specific problems and deficiencies cited by the report are:

(1) inadequate systems for accounting for and reporting trust fund balances; (2) inadequate controls over receipts and disbursements; (3) absence of periodic, timely reconciliations to assure accuracy of accounts; (4) inability to determine accurate cash balances; failure to consistently and prudently invest trust funds and/or pay interest to accountholders; (5) inability to prepare and supply accountholders with meaningful periodic statements of their account balances; (6) absence of consistent, written policies and procedures for trust fund management and accounting; and (7) inadequate staffing, supervision, and training.

*Id.* at 59.

54. *Id.* at 2.

55. *Id.* at 65-66.

56. *Id.*

management of the Indian trust fund.”<sup>57</sup> The committee further stipulated that if no “demonstrable improvement” was shown within six to nine months that Congress should consider the possibility of transferring the trust responsibilities to another federal agency.<sup>58</sup>

#### A. Congressional Recognition of Trust Responsibilities

As a direct result of the *Misplaced Trust* report, Congress enacted the Indian Trust Fund Management Reform Act of 1994<sup>59</sup> (1994 Reform Act) as a means of addressing the specific problems associated with mismanagement of the IIM accounts.<sup>60</sup> The 1994 Reform Act recognized the pre-existing trust responsibilities of the federal government, while clarifying those duties assigned to the Secretary of the Interior as ensuring the “proper discharge of the trust responsibilities of the United States.”<sup>61</sup> Several of the key components of the 1994 Reform Act provide for the creation of “adequate systems for the accounting and reporting of trust fund balances,” the implementation an accounts-receivable system, the timely reconciliation of the accounts, and the establishment of “consistent, written policies and procedures for trust fund management and accounting.”<sup>62</sup>

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57. *Id.* at 66.

58. *Id.* at 66. The report listed the Federal Reserve Board as one potential alternative agency that could serve as fiscal agent for the trust fund. *Id.*

59. American Indian Trust Fund Management Reform Act of 1994, 25 U.S.C. §§ 4001-4061 (2000).

60. See 25 U.S.C. § 4041. The United States Court of Appeals, District of Columbia Circuit, stated that the 1994 Reform Act was “a remedial statute designed to ensure more diligent enforcement of the government’s obligations.” *Cobell v. Norton*, 240 F.3d 1081, 1098 (D.C. Cir. 2001).

61. 25 U.S.C. § 162a(d) (2000).

62. *Id.* The Act provides for the recognition of trust responsibilities and specifies those trust responsibilities assigned to the Secretary of the Interior:

The Secretary’s proper discharge of the trust responsibilities of the United States shall include—but are not limited to—the following:

- (1) Providing adequate systems for accounting for and reporting trust fund balances.
- (2) Providing adequate controls over receipts and disbursements.
- (3) Providing periodic, timely reconciliation to assure the accuracy of accounts.
- (4) Determining accurate cash balances.
- (5) Preparing and supplying account holders with periodic statements of their account performance and with balances of their account which shall be available on a daily basis.
- (6) Establishing consistent, written policies and procedures for trust fund management and accounting.
- (7) Providing adequate staffing, supervision, and training for trust fund management and accounting.
- (8) Appropriately managing the natural resources located within the boundaries of Indian reservations and trust lands.

Title II of the 1994 Reform Act concerns the Indian Trust Fund Management Program and stipulates that its purpose is “to allow tribes an opportunity to manage tribal funds currently held in trust by the United States . . . consistent . . . with the principles of self-determination.”<sup>63</sup> Specifically, the Act attempts to provide tribes with greater control over the management of their trust funds.<sup>64</sup> Section 202 of the Act provides for voluntary withdrawal from the trust fund program and the ability to contract with the federal government.<sup>65</sup>

Title III of the 1994 Reform Act creates the Office of the Special Trustee for American Indians (“OST”) “to provide for more effective management of, and accountability for[,] the proper discharge, of the Secretary’s trust responsibilities.”<sup>66</sup> The Special Trustee is charged with the responsibility of creating a “‘comprehensive strategic plan’ for trust management reform and an appropriate reform timetable to ensure ‘proper and efficient discharge of the Secretary’s trust responsibilities.’”<sup>67</sup> The responsibilities granted to the Special Trustee pertain only to the “general oversight” of the trust responsibilities, with the real decision-

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*Id.*

63. § 4021. This section allows the tribes an “opportunity to manage tribal funds . . . held in trust by the United States.” This section specifically seeks to provide tribes with a greater degree of control over the management of the trust funds, or in the alternate, provide for measures that will allow tribes to become more involved in the management of the trust funds in a manner that is consistent with the trust responsibilities that already apply to the United States as trustee. *Id.* §4021(1).

64. *Id.* § 4022

65. *Id.* The Act states that an “Indian tribe may . . . submit a plan to withdraw some or all funds held in trust.” *Id.* § 4022(a). It further stipulates that in the event that a tribe elects to withdrawal funds, the trust responsibilities of the United States with respect to those funds will cease. *Id.* § 4022(c). Under the Act, a tribe also has the right to return any or all of the trust funds that had previously been withdrawn, thus redeeming the United States trust responsibilities. *Id.* § 4026. It further provides that any plan submitted on behalf of either a tribe or the Secretary of the Interior would not constitute an acceptance of the account balance as accurate, or waive any rights regarding the account balance. *Id.* § 4027.

66. *Id.* §4041. Title III provides that the purpose behind the creation of the Special Trustee is to:

[P]rovide for more effective management of, and accountability for the proper discharge of, the Secretary’s trust responsibilities to Indian tribes and individual Indians by establishing in the Department of the Interior and Office of Special Trustee for American Indians to oversee and coordinate reforms within the Department of practices relating to the management and discharge of such responsibilities.

*Id.* § 4041(1). The Act provides that the reform practices to be carried out in the DOI are also to be uniformly implemented within the BIA, Minerals Management Service, and Bureau of Land Management. *Id.* § 4041(2)

67. *Cobell v. Norton*, 240 F.3d 1081, 1091 (D.C. Cir. 2001) (quoting 25 U.S.C. § 4043(a)(1)).

making authority over the IIM residing with the Secretary of the Interior.<sup>68</sup>

In April 1997, Paul Homan, the first Special Trustee appointed under the 1994 Reform Act, proposed a "strategic plan" to the Secretary of the Interior and Congress.<sup>69</sup> This strategic plan was composed of twelve subprojects designed to "[ensure] the accuracy of information regarding the IIM trust accounts and developing uniform policies and procedures to guide trust management in the future."<sup>70</sup> The Secretary chose to

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68. *Id.* (quoting 25 U.S.C. § 4043(b)(1)).

69. *Id.*

70. *Id.* See also UNITED STATES DEPARTMENT OF THE INTERIOR, DOI TRUST REFORM: TRUST REFORM FINAL REPORT AND ROADMAP (2002) [hereinafter DOI TRUST REFORM]; *Cobell v. Babbitt*, 91 F. Supp. 2d 1 (D.D.C. 1999). The strategic plan proposed by Special Trustee Homan, subsequently adopted by the DOI, consists of a number of specific subprojects. *Id.* These subprojects are identified individually as High Level Implementation Plans ("HLIPs") and consist of the following:

HLIP 1: OST'S IIM Administrative Data Cleanup. This plan deals primarily with beneficiaries' vital information such as names, addresses, and Social Security numbers. *Cobell*, 91 F. Supp. 2d, at 14. The primary objective here is to reconcile data contained on two separate electronic databases: the Integrated Records Management System ("IRMS") and the Land Record Information Systems ("LRIS"). *Id.* By correcting problems and discrepancies associated with these databases and related paper records, the DOI aimed to accurately identify beneficiaries and locate correct mailing addresses for payment purposes. *Id.* at 15.

HLIP 2: BIA Data Cleanup and Management. The primary purpose of this plan is to enable the BIA to "have a level of data in the system that allows for proper land title records and every allottee and every tribe to receive the correct dollars that they're supposed to get." *Id.* The system that is touted to be the solution to the problems associated with data cleanup is the Trust Asset & Accounting Management System ("TAAMS") computer system.

HLIP 3: Probate Backlog. The probate backlog consists of approximately 12,000 cases in which probates have affected the land interests in the IIM trusts. *Cobell*, 91 F. Supp. 2d at 17. These land interests are utilized in order to assure that payment amounts are made to the correct beneficiaries. *Id.* The purpose of this plan is to identify and develop procedures to eliminate the current probate backlog and ensure the proper administration of the IIM trust accounts. *Id.* at 17-18; DOI TRUST REFORM at 45.

HLIP 4: BIA Appraisals. As of 1999, approximately 212,000 title defects needed to be addressed in order to render an accounting. *Cobell*, 91 F. Supp. 2d at 18. This "appraisal backlog" would be eliminated in order to determine the processing of leases, which is an essential part of rendering an accounting. *Id.*

HLIP 5: Trust Fund Accounting Systems ("TFAS"). TFAS is described as a "commercial-off-the-shelf trust fund financial management . . . system." *Id.* Assuming that TFAS is properly integrated with other critical computer systems, it would serve as a means of accurately tracking disbursements, receipts, and securities. *Id.* Furthermore, TFAS would "handle the pricing or evaluation of securities; produce accurate account statements; keep and update correct names and addresses; reconcile accounts; . . . and enforce internal controls through the use of passwords." *Id.*

HLIP 6: TAAMS. The purpose of TAAMS is to enable the BIA to "administer trust assets, generate timely bills, identify delinquent payments, track income from trust assets,

implement a number of the proposed provisions through the High Level Implementation Plan ("HLIP").<sup>71</sup> This plan attempted to facilitate the reform measures by upgrading the computer systems, cleaning up trust records, and eliminating process backlogs.<sup>72</sup> Unfortunately, neither Congress nor the Office of the Special Trustee sought, or provided for, sufficient funding of the 1994 Reform Act in order to provide for HLIP.<sup>73</sup> The concerns addressed in the Special Trustee's HLIP proposals laid the

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and distribute proceeds to the appropriate account holders." *Id.* at 19. Like TFAS, however, the success of TAAMS will depend largely on the reliability and accuracy of the information that entered into the system and the proper integration of related trusts systems. *Id.*

HLIP 7: Mineral Management Systems ("MMS") Reengineering. MMS is responsible for collecting royalties from all mineral resources within Native American trust lands. DOI TRUST REFORM at 88. Those royalties collected are then sent to the BIA and OTFM in order to then be disbursed to the appropriate IIM account. *Id.* Reengineering this system would consist of the development and implementation of a new business system which would focus specifically on "financial and compliance aspects of royalty management." *Id.*

HLIP 8: Records Management. The primary objective with respect to records management is to develop "a coherent plan for the proper retrieval and management of trust documents." *Cobell*, 91 F. Supp. 2d 20. The scope of the problems associated with proper records management of trust documents has most recently been revealed through the discovery phases of the *Cobell* litigation. *See infra* note 108.

HLIP 9: Policies and Procedures. The main objective of this HLIP is to ensure that "consistent, standard methods of achieving business results" are implemented, while at the same time allowing for "continuous improvement." DOI TRUST REFORM at 106. Pursuant to the 1994 Reform Act, "policies, procedures, practices and systems of the Bureau of Indian Affairs, the Bureau of Land Management, and the Minerals Management Service" that are associated with the DOI's trust responsibilities need to be "coordinated, consistent, and integrated" between all agencies. *Id.*

HLIP 10: Training. The training plan pertains to DOI Trust Management employees, with specific reference to "specialized skills training" that is required for the overall Trust reform effort. *Id.* at 116. Training would be centered on TFAS and TAAMS system implementation. *Id.*

HLIP 11: Internal Controls. Internal control is described as being synonymous with management controls, and "comprises the plans, methods and procedures used to meet missions, goals and objectives." *Id.* at 126.

71. *Cobell*, 240 F.3d at 1091.

72. *See supra* note 70.

73. *Cobell*, 240 F.3d at 1092.

groundwork<sup>74</sup> for what has become “the largest class-action suit ever filed by Indians.”<sup>75</sup>

### III. *COBELL V. NORTON*

On June 10, 1996, a class-action lawsuit was filed in the U.S. District Court for the District of Columbia “in an attempt to force the government to account for billions of dollars held in trust for approximately 500,000 American Indians since the early nineteenth century.”<sup>76</sup> The lawsuit alleged that the federal government (including the Secretaries of the Interior and Treasury) had “breached the fiduciary duties” owed to

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74. The trust duties of the United States that were codified in the 1994 Reform Act identify the specific areas of concern that the Secretary of the Interior is required to address. See *Cobell*, 240 F.3d at 1091. The United States’ alleged breach of fiduciary duty, claimed by the *Cobell* plaintiffs, directly relates to the “proper and efficient discharge of the Secretary’s trust responsibilities,” as proscribed by the 1994 Reform Act. *Id.* The effectiveness of the “comprehensive strategic plan” or HLIP, demanded by the 1994 Reform Act, in turn directly relates to the Secretary’s successful performance of her trust responsibilities. *Id.*

75. Timothy Egan, *A Computer Shutdown Plays Havoc at Interior*, N.Y. TIMES, Feb. 14, 2002, at A20.

76. *Cobell*, 240 F.3d at 1092-93; *Cobell v. Norton: An Overview*, available at <http://www.IndianTrust.com/overview.cfm> (last visited Sept. 30, 2003) provides an overview of the aforementioned case from the filing of the class-action lawsuit to the present phase of the litigation.

77. Keith Harper, Plaintiffs’ Counsel in *Cobell v. Norton* litigation, Discussion of the IIM Trust Fund Litigation at the Catholic University of America School of Law (Nov. 22, 2002). The discussion focused on the decision by plaintiffs in the *Cobell* case to apply the law of trusts and focus on the breach of fiduciary duty by the federal government as opposed to focusing on administrative law aspects of the current controversy. *Id.* By applying trust law, the plaintiffs were capable of getting their case into a federal District Court, which applies the law of equity. *Id.* This in turn allowed plaintiffs to present their case under a breach of fiduciary duty theory. *Id.* By presenting the case in this manner, plaintiffs have avoided the complexities associated with administrative law challenges, and centered their argument around the less complex aspects of trust law (i.e., viewing the IIM beneficiaries as any regular beneficiary, and the failure to render an accurate accounting by the federal government as a typical case of a breach of its fiduciary duties). *Id.* Defendants here argue that administrative law should apply to this case, and that as such, the federal district court lacks jurisdiction. See *Cobell v. Norton*, 226 F. Supp. 2d 1, 149 (D.D.C. 2002). Under this theory, the defendants argue that the agencies (DOI and Treasury) handling the IIM accounts have not issued a “final agency action” as required by the Administrative Procedure Act (APA) and in turn are not reviewable by this court. *Id.* The APA states that “[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.” Administrative Procedure Act, 5 U.S.C. § 704 (2000). In rejecting the defendants argument, the district court cited several examples in which federal courts have had “jurisdiction to hear challenges to an agency action” where there are “claims of unreasonable delay” as in the case at hand. *Cobell*, 226 F. Supp. 2d at 149 (citing



plaintiffs<sup>78</sup> by mismanaging the IIM trust accounts.”<sup>79</sup>

The dual purposes of this litigation, filed by Eloise Cobell,<sup>80</sup> were to force the federal government to (1) “bring about permanent reform of the system,” and (2) to provide an accurate historical accounting of the trust fund money.<sup>81</sup> The case was subsequently bifurcated along these lines.<sup>82</sup> The first phase of the trial, which focused on reforming the

Telecommunications Research and Action Ctr. v. FCC, 750 F.2d 70, 75 (D.C. Cir. 1984)); see also *Sierra Club v. Thomas*, 828 F.2d 783, 793 (D.C. Cir. 1987). The district court further held that “it had jurisdiction to adjudicate the plaintiffs’ claims . . . pursuant to Section 702 of the Administrative Procedure Act . . . finding that ‘[t]he case law and legislative history with respect to § 702 clearly evince the federal government’s consent to suit in the present case.’” See *Cobell*, 226 F. Supp. 2d at 15. Section 702 “eliminate[s] the defense of sovereign immunity in cases in which the plaintiffs are seeking ‘other than money damages.’” WILLIAM F. FOX, UNDERSTANDING ADMINISTRATIVE LAW § 10.04 (Lexis Publishing, 4th ed. 2000). In shooting down the government’s argument of sovereign immunity pursuant to APA § 702, Judge Lamberth held that the plaintiffs were “only seek[ing] to balance the checkbook, not to add any money to the checking account.” *Cobell v. Norton*, 30 F. Supp. 2d 24 (1998). Gibeaut, *supra* note 2, at 47, discussing the fact that DOJ attempted to “get out from under the heavy equitable thumb of the District Court and into the claims court, which typically handles Indian suits for damages.” *Id.* Nell Jessup Newton, Dean of the University of Denver College of Law, stated that “Indians can’t win in the court of claims, so the government always tries to get the case moved into the court of claims.” *Id.* (referring to the court of claims as “notoriously stingy with Indians”).

78. *Cobell v. Norton*, (D.D.C. Feb. 4, 1997) (No. 1:96 CV 01285) (Order Certifying Class Action). Pursuant to Federal Rules of Civil Procedure 23(b)(1)(A) and (b)(2), plaintiffs in this “class consist of present and former beneficiaries of [IIM] accounts.” The court further found that the prosecution or adjudication of individual actions on this matter would result in inconsistent standards for the defendants to follow. *Id.* at 1-2.

79. See *Cobell*, 240 F.3d at 1092-93 (2001); see also *Cobell*, 30 F. Supp. 2d 24 (D.D.C. 1998); *Indian Trust: Cobell v. Norton: An Overview* at <http://www.IndianTrust.com/overview.cfm> (last visited Sept. 16, 2002).

80. Lead plaintiff Eloise Cobell is a member of the Blackfeet Tribe in Montana and is the founder and current Chair of the Blackfeet National Bank. *Indian Trust: Cobell v. Norton, Biography of Eloise Cobell* at <http://www.IndianTrust.com/bio.cfm> (last visited Sept. 30, 2002). With a background in accounting, Ms. Cobell played a key role in the formation of “the Blackfeet National Bank, the first national bank located on an Indian reservation and owned by a Native American tribe.” *Id.*

81. *Indian Trust*, *supra* note 79.

82. *Cobell*, 240 F.3d at 1093. The case was bifurcated on May 5, 1998 into two phases. Phase I addressed “‘fixing the system’ or reforming the management and accounting of the IIM trusts so as to meet the federal government’s fiduciary responsibilities.” *Id.* Phase II, which has yet to begin, will attempt to “address historical accounting of the accounts.” *Id.* In September 2002, Judge Lamberth ordered that the case’s trifurcation and concluded that a Phase one and a half would be necessary due to the DOI’s inability to comply with the previous court orders regarding the implementation of an effective trust reform system. *Cobell v. Norton*, 226 F. Supp. 2d 1, 147-48 (D.D.C. 2002). Judge Lamberth stated that “[t]he recalcitrance exhibited by Department of Interior in complying with the orders of this Court is only surpassed by the incompetence that the agency has shown in administering the IIM trust.” *Id.* at 148.

system, found that the Secretaries of the Interior and Treasury had breached their trust obligations to the IIM account holders.<sup>83</sup> In an effort to ensure compliance with court orders, Judge Lamberth retained control over the case.<sup>84</sup> In addition, Judge Lamberth appointed a special master to oversee the preservation and production of trust-related documents and a federal monitor to provide the judge with an assessment of the Interior's execution of trust reform.<sup>85</sup> Over a year and a half after Judge Lamberth's 1999 order,<sup>86</sup> which demanded an accurate historical accounting of IIM funds, the DOI's efforts have been described as "still at the starting gates" and marked with "unrealistic responses and evasion."<sup>87</sup>

Criticism of the DOI and the Treasury Department's progress following the implementation of the 1994 Reform Act was not confined to the judiciary. Senator John McCain (R-AZ), stated that the DOI's management of the Indian trust system, under the direction of Secretary Babbitt, was "[w]orse than anyone could ever imagine."<sup>88</sup> McCain added that if a situation such as this was affecting any other group of

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83. *Cobell*, 240 F.3d at 1093-94. The December 21, 1999 ruling, which found that the federal government had specifically breached some of its fiduciary duties to the Indians, concluded the following: "Under the 1994 Act [the federal government] must provide IIM trust beneficiaries with 'an accurate accounting of all money in the IIM trust . . . without regard to when the funds were deposited.'" That in addition, under the 1994 Reform Act, the federal government must "retrieve and retain all information concerning the IIM trust that is necessary to render an accurate accounting." *Id.* at 1093 (citing *Cobell*, 91 F. Supp. 2d at 58). The court also found that the Secretary of the Interior and the Assistant Secretary must provide "written policies and procedures" that provide for the collection of missing information, the retention of IIM trust documents, and the creation of a computer and business system necessary for an accurate accounting. *Id.* at 1094 (citing *Cobell*, 91 F. Supp. 2d at 58). Finally, the court held that "the Treasury Secretary owes the IIM trust beneficiaries 'the statutory trust duty to retain IIM trust documents.'" *Id.* (citing *Cobell*, 91 F. Supp. 2d at 58).

84. *Indian Trust*, *supra* note 79. By retaining control, Judge Lamberth further sought to ensure successful overhaul of the system, and that the DOI follow through with rendering an accurate historical accounting of all trust fund moneys. *Id.*

85. *Id.*

86. *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 58 (D.D.C. 1999).

87. *Indian Trust*, *supra* note 79. Because DOI officials failed to take the case seriously when it was first filed in 1996, little progress initially was made in *Cobell*. Gibeaut, *supra* note 2, at 41 (1999) (providing in part that the "case either could have been settled or dismissed long ago had it not been for the government's initial failure to take it seriously."). When the Department of Justice first received the case, it initially assigned two lawyers to it. *Id.* Today, there are approximately sixty attorneys assisting in the case on behalf of the federal government. Harper, *supra* note 77.

88. *60 Minutes: Broken Promises; U.S. Government's Mismanagement of Indian Nations' Moneys* (CBS television broadcast, Apr. 2, 2000) (interview by Mike Wallace of Senator John McCain (R-AZ), a member of the Indian Affairs Committee, discussing the problems associated with the Indian trust system).

Americans, "there would be an outcry, there'd be lawsuits, there'd be . . . a national scandal."<sup>89</sup>

#### IV. THE FEDERAL GOVERNMENT'S INABILITY TO RENDER AN ACCURATE ACCOUNTING AND TO REFORM THE IIM TRUST SYSTEM

A February 23, 2001 decision by the D.C. Circuit Court provided:

The government's broad duty to provide a complete historical accounting to IIM beneficiaries necessarily imposes substantial subsidiary duties on those government officials with responsibility for ensuring that an accounting can and will take place. In particular, it imposes obligations on those who administer the IIM trust lands and funds to, among other things, maintain and complete existing records, recover missing records where possible, and develop plans and procedures sufficient to ensure that all aspects of the accounting process are carried out.<sup>90</sup>

A recent opinion and order by Judge Lamberth provides insight into the degree with which the federal government has fallen short of meeting its fiduciary obligations.<sup>91</sup> Judge Lamberth stated that the "Department of the Interior's administration of the Individual Indian Money trust has served as the gold standard for mismanagement by the federal

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89. *Id.* Representative Tom Udall of New Mexico was discussing the unjust treatment of the trust fund holders when he recently stated that "[i]f 40,000 people were cut off Social Security, there would be an uproar in Congress." Ellen Nakashima & Neely Tucker, *Lost Trust: Billions Go Unaccounted; Indians in Century-Old Fight to Tally Money Owed for Land Use*, WASH. POST, Apr. 22, 2002, at A1.

90. *Cobell v. Norton*, 240 F.3d 1081, 1105 (D.C. Cir. 2001).

91. *Cobell v. Norton*, 226 F. Supp. 2d 1, 161-63 (D.D.C. 2002). A primary concern is the Department of the Interior's conduct during the course of the *Cobell* litigation. *Id.* A recent decision by Judge Lamberth found that current Secretary of the Interior Gale Norton and Assistant Secretary McCaleb committed four counts of fraud. *Id.* They were held in contempt of court for engaging in litigation misconduct and failing to initiate the accounting that had been ordered. *Id.* This, however, was not the first instance of misconduct by DOI that the court noted. In February 1999, then-Secretary of the Interior Bruce Babbitt and then-Assistant Secretary for Indian Affairs Kevin Gover were held in civil contempt for violating two of the court's discovery orders. *Cobell v. Norton*, 37 F. Supp. 2d 6, 8 (D.D.C. 1999). Judge Lamberth stated that "the Department of Interior has handled this litigation the same way that it has managed the IIM trust—disgracefully." *Cobell*, 226 F. Supp. 2d at 11. Along similar lines, Dennis M. Gingold, a lawyer for the plaintiffs, has proposed that Judge Lamberth consider jailing those individuals involved in a recent case of alleged retaliation against a BIA employee that had criticized the DOI's trust reform efforts. Bill Miller, *Retaliation Alleged at Interior: Special Master Says Whistle-Blower in Indian Case Punished*, WASH. POST, Feb. 22, 2001, at A17. The incident involved the demotion of Mona Infield, a computer specialist at the BIA, apparently in retaliation for exposing problems associated with the BIA's lack of progress in its efforts to reform the trust system. *Id.*

government.”<sup>92</sup> Specifically, Judge Lamberth noted that the Secretary of the Interior, Gale Norton, was unable to determine the number of IIM trust accounts, how much money should be in the trust, and the correct balances for the individual accounts.<sup>93</sup> Furthermore, Judge Lamberth stated that the federal government “regularly issue[d] payments to beneficiaries of their own money in erroneous amounts.”<sup>94</sup> This brief synopsis of the problems associated with the IIM trust accounts oversimplifies a problem that has resulted from decades of neglect and mismanagement.<sup>95</sup>

In a recent hearing before the United States Senate Committee on Indian Affairs, Paul M. Homan, former Special Trustee for American Indians, stated that the primary cause of trust mismanagement and neglect was a “lack of competent managerial resources to manage

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92. *Cobell*, 226 F. Supp. 2d at 11.

93. *Id.* at 11. In February of 2001, the D.C. Circuit Court stated:

The federal government does not know the precise number of IIM trust accounts that it is to administer and protect. At present, the Interior Department’s system contains over 300,000 accounts covering an estimated 11 million acres, but the Department is unsure whether this is the proper number of accounts . . . . Not only does the Interior department not know the proper number of accounts, it does not know the proper balances for each IIM account, nor does Interior have sufficient records to determine the value of IIM accounts . . . . Current account reconciliation procedures are insufficient to ensure that existing account records, reported account balances, or payments to IIM beneficiaries are accurate . . . . As a result, the government regularly issues payments to trust beneficiaries “in erroneous amounts—from unreconciled accounts—some of which are known to have incorrect balances.”

*Cobell*, 240 F.3d at 1089 (quoting in part *Cobell*, 91 F. Supp. 2d at 6).

94. *Cobell*, 226 F. Supp. 2d at 11 (D.D.C. 2002).

95. The problems associated with providing an accurate historical accounting and reformation of the system reveal only one side of the situation at hand. The longstanding problems associated with the IIM trust fund are not limited to negligent record keeping and faulty accounting practices. Numerous sanctions have been filed against DOI and Treasury officials, culminating in the most recent order holding Secretary of Interior Gale Norton in contempt of court for deceiving Judge Lamberth about the agency’s failure to reform the trust system. Rumbelow & Tucker, *supra* note 1 (providing in part that DOI Secretary Gale Norton and Assistant Secretary for Indian Affairs Neal McCaleb were held in contempt of court for committing fraud on the court and failing to abide by the 1999 court order to begin reformation of the trust system); John McCaslin, *Continuous Contempt*, WASH. TIMES, Jan. 18, 2002, at A9 (providing that in 1999, Judge Lamberth found Treasury Secretary Robert Rubin and DOI Secretary Bruce Babbitt in contempt of court for repeatedly violating court orders demanding a stop of the destruction of potentially trust-related documents). Forty current and former government lawyers, information officers, and deputy and assistant secretaries face possible sanctions in conjunction with the *Cobell* lawsuit. Deirdre Davidson, *Indian Trust Suit Takes Toll at Interior: Employees Fleeing Case, Buying Personal Liability Insurance*, LEGAL TIMES, Mar. 25, 2002, at 1. Davidson also discussed the unusually personal nature of the suit and the fact that plaintiffs are “not just attack[ing] the government and its policies, but [are going] after individual employees.” *Id.*

effectively and efficiently the trust management responsibilities to American Indian beneficiaries.”<sup>96</sup> Homan added that the managers and staff employed at the DOI and BIA lack sufficient knowledge and practical experience “necessary to manage the federal government’s trust management activities according to the exacting fiduciary standards required in today’s modern trust environment.”<sup>97</sup> Additionally Homan stated that the organizational structure of the BIA resulted in an “intricate and complex coordination process” that proved ineffective in dealing with decision-making and management issues pertaining to the IIM accounts.<sup>98</sup>

In analyzing the current state of the IIM trust fund, it is necessary to take into account a number of underlying issues that have prevented any type of substantive and positive reform.<sup>99</sup> Two main concerns need addressing; the first pertains to rendering an accurate historical accounting, and the second deals primarily with creating some sort of written plan addressing the manner in which the 1994 Reform Act should be implemented.<sup>100</sup> The most pervasive problem associated with

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96. *The Role of the Special Trustee Within the Department of the Interior: Hearing Before the Senate Committee on Indian Affairs* (Sept. 24, 2002) (statement of Paul M. Homan, Former Special Trustee for American Indians) [hereinafter *Hearing*]; see also Bill Miller, *Indian Trust Reform Still Mired, Watchdog Says; Receivership Urged for Interior Program*, WASH. POST, Sept. 18, 2001, at A29 (discussing DOI Secretary Norton’s continuing reliance on the same longtime managers who have for years failed to make any type of substantive reform to the trust system).

97. See *Hearing*, *supra* note 96. The aforementioned managerial incompetence coupled with the inherent flaws associated with the BIA’s organizational structure are the primary reasons why:

[T]he BIA has never originated meaningful reforms of the trust management processes in the last 30 years.

[T]he BIA has resisted and ultimately failed to implement nearly all of the meaningful reform efforts attempted in the last 30 years.

[A] new organizational structure, new management and massive retraining are necessary for the future management of the Federal Government’s trust responsibilities to American Indians and the management of the implementation of reforms identified in the Reform Act of 1994.

*Id.*

98. *Id.*

99. In addition to the managerial and accounting issues, are the Court’s findings that the Department of the Interior engaged in litigation misconduct, concealment, and fraud. *Cobell v. Norton*, 226 F. Supp. 2d 1, 161 (D.D.C. 2002). These charges focus on the Interior’s failure to initiate a historical accounting, failure to disclose the status of the TAAMS subproject, the filing of false and misleading status reports pertaining to TAAMS and the BIA Data Cleanup, and the making of false and misleading representations regarding the computer security of IIM trust information. *Id.* at 1-2; *supra* note 97.

100. *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 30-43 (D.D.C. 1999).

reformation of the IIM trust accounts remains the Interior's inability to render an accurate accounting.<sup>101</sup>

In rendering an accurate accounting, "the single biggest obstacle that Interior . . . face[s]" is missing data.<sup>102</sup> In passing the Indian Trust Fund Management Reform Act of 1994, Congress was well aware of the problems associated with past document management policies practiced by the DOI and Treasury.<sup>103</sup> The district court cited "inadequate document management" as "one of the top criticisms of Interior's handling of the IIM trust in terms of its eventual ability to render an accounting."<sup>104</sup>

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101. *Id.* at 97.

102. *Id.*; see also Robert Gehrke, *Judge Blocks Plan to Move 32,000 Boxes of Indian Trust Records*, ASSOC. PRESS, Apr. 18, 2002 (discussing the problems associated with the DOI's handling of trust-related documents and Judge Lamberth's order blocking Special Trustee, Alan Balaran, from shipping 32,000 boxes of documents to Albuquerque, and further stating that approximately 1,300 boxes out of 8,000 that were supposedly stored at the Albuquerque location could not be located). See also Neely Tucker, *Norton Admits Some Indian Trust Records 'No Longer Exist': Interior Chief Defends Reform Efforts*, WASH. POST, Feb. 14, 2002, at A31; James Warren, *U.S. Agency Admits Errors in Indian Case; Records Destroyed on Cash Payouts*, CHI. TRIB, Aug. 15, 2001, at 10; Robert Gehrke, *Government Criticized for Erasing E-mail Records in Indian Trust Fund Records*, ASSOC. PRESS, July 30, 2001.

103. *Misplaced Trust*, *supra* note 53. As opposed to merely allowing the Department of the Interior and the Department of Treasury to issue informal orders pertaining to their inability to render accurate accounting of the IIM trust accounts, Congress specifically demanded that a full and accurate account of all funds be made. *Id.* Congressman Synar, primary author of *Misplaced Trust*, was quoted as saying:

[S]peaking on behalf of myself and [Congressman] Yates and four Congresses, it is our clear intention—and let the Record show—it is our clear intention that these [Indian trust] accounts will be reconciled and audited before there is any movement or transfer [of the funds]. If you interpret that any other way, or if your lawyers or personnel do, you're interpreting it wrong.

*Id.*

104. *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 43 (D.D.C. 1999); See *60 Minutes: Broken Promises*, *supra* note 88 (highlighting some of the specific problems associated with the DOI's record keeping). Some of the problems discussed include:

Beneficiaries receiving checks with minimal or no documentation, which in turn makes it extremely difficult for beneficiaries to determine if they are receiving a fair share of the proceeds generated from the oil income.

Lack of information/documentation pertaining to individual trust beneficiary property or the resources derived from that property.

Approximately 50,000 accounts that do not have proper names or addresses.

*Id.* As with the DOI, Treasury also faces a number of trust management responsibilities. *Cobell v. Norton*, 240 F.3d 1081, 1088 (2001). The policies and practices of the Treasury that have come under fire pertain to the Department's document destruction policies, loss of investment funds due to the time lapse between deposit of those funds with the Treasury and investment of those funds by the DOI, and loss of interest on IIM checks between the time the check is issued and the time it is presented for payment. *Id.* at 1092. Policies include the destruction of documents over six years and seven months old, with

In developing a system of document management, the court directed the Interior department to develop a written plan and procedure pertaining to document retrieval.<sup>105</sup> The primary purpose was to develop a plan that would deal with the management of all IIM-related trust documents that would be relevant to the rendering of an accurate accounting.<sup>106</sup> The problem associated with the creation and implementation of a plan covering the management of documents is that an unknown number of trust documents have been destroyed<sup>107</sup> or are otherwise inaccessible.<sup>108</sup>

Special Trustee Homan testified that “[t]he records are the base for the entire trust operation.”<sup>109</sup> As such, Congress demanded that the Interior “create and finalize a plan for the proper retention of all IIM-related trust documents necessary to render an accurate accounting.”<sup>110</sup> This is more easily said than done.<sup>111</sup> It is impossible to perform an

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minimal effort taken to preserve those documents that may be needed to conduct an accurate accounting of the trust funds. *Id.*

105. *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 34 (D.D.C. 1999). Treasury, like the DOI, has proposed the development of similar systems and procedures to facilitate in the Treasury’s fulfillment of its fiduciary responsibilities. *Cobell v. Norton*, 240 F.3d 1081, 1092 (2001).

106. *Cobell*, 91 F. Supp. 2d at 34.

107. Peter Maas, *The Broken Promise*, *PARADE*, Sept. 9, 2001, at 4. The full scope of the document destruction first came to light following the initiation of the class-action suit headed by Eloise Cobell. *Id.* at 6. A special investigator appointed by Judge Lamberth discovered that the Department of the Interior had been destroying documents pertaining to the IIM trust fund. *Id.* Furthermore, the special investigator determined that the “Treasury officials had shredded 162 cartons of ledgers listing transactions and disbursements plus records of uncashed checks—some 100 years old—that never reached their intended Indian recipients.” *Id.*; see *infra* at note 112.

108. Gibeaut, *supra* note 2, at 47-48. Gibeaut cited an instance when government officials moved hundreds of boxes containing trust-related documents to a warehouse in Albuquerque, New Mexico. Upon examination of the warehouse, it was determined that review of these documents would not be permitted because the building was “contaminated with deadly rodent-borne hantavirus.” *Id.* Keith Harper cited another instance in which documents were determined to be inaccessible, because the Occupational Safety and Health Administration found that the boxes containing the trust documents were stacked too high and therefore created an unsafe work environment. Harper, *supra* note 77.

109. *Cobell*, 91 F. Supp. 2d 1, 14 (D.D.C. 1999) (citing the trial transcript at 3164).

110. *Id.* at 43.

111. Gibeaut, *supra* note 2, at 47-48. Documents relevant to this litigation date back to the establishment of the trust system and the General Allotment Act of 1887. *Id.* at 47. These trust-related documents were stored at Treasury facilities, DOI offices, and over ninety different Indian agencies across the country. *Id.* The crux of the problem with the production of these documents in the *Cobell* lawsuit centers around the scope of the production order issued by Judge Lamberth. *Id.* The order required that the government produce documents pertinent to the five named plaintiffs and their predecessors in interest. *Id.* Each of the aforementioned plaintiffs is identified as either a current or past beneficiary of the IIM trust. *Cobell*, 91 F. Supp. 2d at 14. By expanding the scope of

accurate accounting when the agency charged with that responsibility has destroyed or lost the necessary trust documents required to render such an accounting.<sup>112</sup> Therefore, the December 21, 1999 order charged the Interior with the responsibility of creating a plan that “clearly stat[es] which documents it will keep and which it will destroy.”<sup>113</sup> Without such documentation, beneficiaries “will never be able to estimate how much of their own money is in the IIM trust.”<sup>114</sup> The requirement that the Interior provide for the proper planning of “architecture and staffing”<sup>115</sup> is synonymous with the demand on the Interior to render an accurate accounting. This requirement is based on the historical problems associated with the IIM mismanagement, the inconsistent past practices of the Interior, the “dramatic reforms planned for trust management,” and Congress’ demand on the Interior to render an accurate accounting.<sup>116</sup>

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production to include their predecessors in interest, thousands of files would need to be located and analyzed at a cost of approximately \$80 million in order to render an accurate accounting. Gibeaut, *supra* note 2, at 47-48. In 1998, DOJ officials sharply criticized the DOJ lawyer, Willa B. Permulmutter, for negotiating the production order. *Id.* at 48. DOJ officials argued, to no avail, before Judge Lamberth that she “obviously didn’t understand what she had . . . agreed to.” *Id.*

112. *Cobell*, 91 F. Supp. 2d at 43. Interior Department officials have admitted that their ability to render an accurate accounting has been complicated by the fact that some of the records needed to perform this task are missing or have been destroyed. *More Indian Trust Documents Missing*, DENVER POST, Jan. 17, 2001, at A4 (citing the destruction of what appeared to be approximately 160 boxes of trust-related documents at the Bureau of Indian Affairs’ Northern Cheyenne office). The problem associated with the destruction of trust-related documents is not limited to historical records. In July 2001, Judge Lamberth was notified that the DOI had been destroying e-mails and other electronic materials that may have been pertinent to the mismanaged IIM accounts. Robert Gehrke, *Government Criticized for Erasing E-mail Records in Indian Trust Fund Case*, ASSOC. PRESS, July 30, 2001.

113. *Cobell*, 91 F. Supp. 2d at 43.

114. *Id.*

115. *Id.* at 44.

116. *Id.* at 44-45.



The two key components of the aforementioned requirement<sup>117</sup> pertain specifically to the “computer systems architecture” and the “business-systems architecture;” both are necessary to carry out the fiduciary responsibilities set forth in the Reform Act of 1994.<sup>118</sup> The purpose in developing these two systems is to provide for the consistent and fluid functioning of the trust management and to ensure that the federal government will eventually live up to its fiduciary responsibilities.<sup>119</sup> Pursuant to the Reform Act of 1994, the court required the Secretary of the Interior to properly discharge the trust responsibilities of the United States through adequate staffing, supervision, and training of the trust’s management and accounting personnel.<sup>120</sup>

### *A. Non-Compliance With Reform*

The Interior Department’s IIM trust fund reform plan has made little progress since Judge Lamberth’s December 21, 1999 Order.<sup>121</sup> A statement made in a memorandum by Dominic Nessi, then-Chief Information Officer for the BIA, highlighted the so-called “progress” of the reform efforts following the 1999 ruling.<sup>122</sup> In the memo, Nessi stated

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117. Bill Miller & Ellen Nakashima, *Interior Dept. Mised Court On Reforms, Report Says*, WASH. POST, Aug. 10, 2001, at A2. The “centerpiece” of the reform process is the Trust Asset and Accounting Management System (“TAAMS”). *Id.* The system was designed to “automatically keep track of titles, trust accounts and income generated from roughly 170,000 tracts of land.” *Id.* Specifically, TAAMS was intended to keep track of the roughly \$500 million generated each year from royalties from the sales of timber, oil and gas, and other natural resources which are supposed to be channeled into the IIM accounts. *Id.* Joseph Kieffer, the court appointed monitor assigned to assess the progress of the trust fund reform recently stated that the General Accounting Office recommended to DOI that they “scrap[] the system entirely, after ‘tens of millions of dollars’ [had already been] invested.” *Id.* Kieffer has further stated that the “quality of the [TAAMS] automated system depends on the accuracy of the records that go into it.” Bill Miller, *Indian Trust Reform Still Mired, Watchdog Says Receivership Urged for Interior Program*, WASH. POST, Sept. 18, 2001, at A29. Kieffer also stated that as of September 2001, only a fraction of the work had been completed and that on average, “one land tract a day is logged into the computer.” Unfortunately, even that information is questionable. *Id.*

118. *Cobell*, 91 F. Supp. 2d at 44.

119. *See id.* at 44-45.

120. *See id.* at 45.

121. *Cobell v. Norton*, 240 F. 3d 1081, 1089 (D.C. Cir. 2001).

122. Defendants’ Motion for a Second Extension of Time to File Response to Plaintiffs’ Motion to reopen Trial One and Memorandum in Support Thereof at Attach. 2, *Cobell v. Norton*, 226 F. Supp. 2d 1 (D.D.C. 2001). Attachment Two is a letter regarding the trust reform from then-Chief Information Officer (“CIO”), Dom Nessi to Tom Slonaker, Special Trustee. As CIO, Nessi was in charge of the implementation of the highly touted TAAMS, which was designed to allow the BIA “to administer trust assets, generate timely bills, identify delinquent payments, track income from trust assets, and distribute proceeds to the appropriate account holders.” *Cobell*, 240 F. Supp. 2d 1, 49

“that trust reform is slowly, but surely imploding at this point in time.”<sup>123</sup> Shortly thereafter, on April 16, 2001, the court appointed a court monitor to “monitor and review all of the Interior[’s] . . . trust reform activities and file written reports of his findings with the [c]ourt.”<sup>124</sup> The first report of the court monitor, filed on July 11, 2001, described the Department of the Interior’s efforts with respect to the rendering of a historical accounting as, “for a lack of a better term, at ground zero.”<sup>125</sup>

The Special Master’s Report and Recommendation Regarding the Security of Trust Data at the Department of the Interior further supports the conclusion that the Department of Interior has been unsuccessful in its reform efforts.<sup>126</sup> The Special Master’s findings revealed that the

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(D.D.C. 2002); Ellen Nakashima, *Effort to Fix Indian Trust Funds ‘Imploding,’ Memo Says*, WASH. POST, Mar. 19, 2001, at A7.

123. Defendants’ Motion for a Second Extension of Time to File Response to Plaintiffs’ Motion to reopen Trial One and Memorandum in Support Thereof at Attach. 2, *Cobell v. Norton*, 226 F. Supp. 2d 1 (D.D.C. 2001) (No. 1:96 CV 01285). Nessi’s memo also discusses the TAAMS project’s lack of direction by quoting Yogi Berra; “If you don’t know where you are going, you end up somewhere else.” *Id.* Nakashima, *supra* note 122 (re-affirming that “[t]he federal government’s effort to fix billions of dollars in Indian Trust funds is ‘slowly, but surely imploding,’ according to a memo written by [Dom Nessi]”).

124. *Cobell v. Norton*, 226 F. Supp. 2d 1, 19 (D.C. Cir. 2001). Tom Sloaner, Special Trustee for American Indians, testified that the TAAMS system would be operational by May 2003, but would not be able to provide “accurate historical land and asset records” until 2005. Ellen Nakashima, *Panel Criticizes Indian Trust Plan: House Members Worry U.S. Won’t Fully Account for Assets*, WASH. POST, Mar. 22, 2001, at A27. After hearing this testimony, Norman Dicks, Representative and member of the House Appropriations Subcommittee on the Interior, stated that “[t]here is no reason for Congress to be very confident in” the development and implementation of TAAMS. *Id.* On the opposite end of the spectrum, DOI officials commented that they have “created the first-ever office of historical trust accounting,” and [they] “remain committed to improving trust reform for the good of the country.” Miller & Nakashima, *supra* note 117.

125. First Report of The Court Monitor at 2, *Cobell v. Norton*, 240 F.3d 1081, (D.D.C. 2002) (No. 96-1285 (RCL)). See also John J. Fialka, *Babbitt Misled Judge About New System for Indian Funds in ‘99, Report Alleges*, WALL ST. J., Aug. 10, 2001, at A10. Judge Lamberth appointed special investigator Kieffer to “examine the Interior Department reform efforts.” *Id.* Kieffer reported that the information that was being reported to Judge Lamberth in regard to the progress of the TAAMS project was “at best misleading and at worst false.” *Id.*

126. Report and Recommendation of the Special Master Regarding the Security of Trust Data at the Department of the Interior at 11, Dec. 4, 2001, *Cobell v. Norton*, 240 F.3d 1081 (D.D.C. 2002) (No. 1:96 CV 01285) Under Seal. Submitted on November 14, 2001, the Report discussed the importance of maintaining a secure system because of the sensitive nature of the IIM trust information. See also First Investigative Report of the Special Master Regarding Defendants’ Response to Document Request 9 of Attachment B to the Subpoena Duces Tecum at 12, *Cobell v. Norton*, 240 F.3d 1081 (D.D.C. 2002) (No. 1:96 CV 01285) (stating that the DOI cannot prove it made records management reform because “Interior has no documents that support its claims that the tasks are completed”).

Department of the Interior had “demonstrated a pattern of neglect that has threatened, and continues to threaten, the integrity of trust data upon which Indian beneficiaries depend.”<sup>127</sup> Subsequently, the court concluded that the “Department failed to take any substantive action for eighteen months after this Court issued its Phase I trial ruling.”<sup>128</sup> As a result, the court ordered the Department of the Interior to file a plan detailing how it would bring itself “into compliance with the fiduciary obligations that [it owes] to the IIM beneficiaries.”<sup>129</sup> Furthermore, the court allowed the plaintiffs and the Department of Treasury to file plans of their own pertaining to the aforementioned issues.<sup>130</sup>

## V. PROPOSED SOLUTIONS

A number of proposals have been put forth that attempt to fix the longstanding problems associated with the IIM trust fund accounts. The following proposals focus on managerial and administrative techniques or methods that would purportedly remedy the longstanding problems associated with the current trust management system. Not all of these remedies touch upon the same specific issues, but they all have the primary goal of creating a different type of managerial body that would handle the trust issues currently in the hands of the BIA and the DOI.<sup>131</sup>

In April 2002, Senators John McCain, Tom Daschle, and Tim Johnson introduced the Indian Trust Asset and Trust Fund Management Reform Act of 2002.<sup>132</sup> This discussion bill proposed two changes to the Indian

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127. *Cobell v. Norton*, 226 F. Supp. 2d 1, 19 (D.C. Cir. 2001).

128. *Id.* at 19-20.

129. *Id.* at 162 (ordering the plan to have a January 6, 2003 deadline).

130. *Id.* at 152 (stating that in cases concerning longstanding violations, plaintiffs should be able to file their own proposals because of the “unconscionable delay by the defendants in performing a historical accounting and discharging their fiduciary duties properly”).

131. *Id.* at 161-63.

132. Indian Trust Asset and Trust Fund Management and Reform Act of 2002, S.2212, 107th Cong. (2002). The discussion bill, introduced by Senators McCain, Daschle, and Johnson, focused on a number of the same key concerns addressed in the *Misplaced Trust* report. *Id.*; *Misplaced Trust*, *supra* note 53, at 63-64 (discussing the Congressional Oversight Committee’s instruction to consider “alternatives that would allow . . . individual Indians greater control and flexibility in the management of their trust funds, without eliminating the trust responsibility”). Several of the aforementioned alternatives include:

Authorizing tribes to manage their own funds within the trust status with management plans and actual management subject to trustee approval and monitoring; authorizing tribes to direct the trustee on how to manage tribal funds, such as investing tribal trust funds in local banks to allow the tribes to realize greater economic leverage from their funds; and authorizing tribes and other representatives of IIM accountholders to manage IIM accounts subject to appropriate controls and trustee supervision and monitoring.

Trust Fund Management Reform Act of 1994.<sup>133</sup> First, it proposed the creation of a Deputy Secretary for Trust Management and Reform.<sup>134</sup> The Deputy Secretary would oversee all trust fund asset administration and management, including “consultations with Indian tribes and individual [Indian] trust asset and trust fund account holders.”<sup>135</sup> The Deputy would head a newly created Office of Trust Reform Implementation and Oversight, which would supervise the day to day responsibilities of the Assistant Secretary, the Special Trustee, the Director of Minerals Management Service, and the Director of the Bureau of Land Management with regard to the administration of Indian trust assets.<sup>136</sup>

The second key component of this bill is a set of provisions whereby the Indian tribes and beneficiaries can directly manage or co-manage, along with the Interior Secretary, trust funds assets, based on successful tribal self-determination policies.<sup>137</sup> This provision would allow Indian

*Id.* at 64.

133. S.2212, 107th Cong. (2002).

134. *Id.* § 2. The President, with Senate approval, would appoint the Deputy for a period of six years; the Deputy would report directly to the Secretary of the Interior. *Id.*

135. *Id.*

136. *Id.* Section 2 provides that this newly created entity would function under Title II of the Indian Trust Fund Management Reform Act of 1994. *Id.* The Office of Trust Reform would be responsible for the following duties:

1. Authorization to require the development and maintenance of an accurate inventory of all trust properties, funds, and other assets;
2. Ensure the prompt posting of revenues derived from trust funds, properties, and assets;
3. Ensure that trust fund account holders receive monthly statements;
4. Ensure that trust fund accounts are audited at least once a year or more frequently if necessary;
5. Ensure that the Secretary receives current and accurate information relating to the administration and management of the trust funds, properties, and assets; provide for regular consultation with trust fund account holders to ensure the greatest return on trust assets and properties for the trust account holders; and
6. Enter into contracts and compacts under the Indian Self Determination Act for the management of trust assets and funds by Indian tribes. *Id.* Section 2 also provides that the Advisory Board (which currently functions on behalf of the Special Trustee), would function on behalf of the Deputy Secretary. *Id.* The Advisory Board would be comprised of tribal and individual accountholders, and members experienced in trust fund and financial management, fiduciary investment management, and management of large organizations. *Id.*

137. *Id.* § 3. Indian participation in trust fund activities would remove sections 202 and 203 of the 1994 Reform Act and replace them with a new section 202 that would provide for the development and implementation of the Indian Trust Fund and Asset Management and Monitoring Plan. Under this section each plan would be required to:

- A. [D]etermine the amount and source of funds held in trust;
- B. [I]dentify and prepare an inventory of all trust assets;
- C. [I]dentify specific tribal goals and objectives;

tribes to use a greater degree of discretion in “designing and carrying out” the planning and management processes related to the trust funds.<sup>138</sup> The Secretary would consult with tribes that choose not to participate in order to develop an appropriate plan.<sup>139</sup> Under this proposition, the DOI must consult and maintain involvement with tribes pursuant to a course of action jointly chosen by the tribes and the DOI.<sup>140</sup>

Another potential proposal, put forth by the Tribal Leaders and DOI Trust Reform Task Force (Task Force),<sup>141</sup> would consolidate all trust responsibilities in one place within the Department of the Interior.<sup>142</sup> The main objective of the Task Force is to develop a number of organizational structures that would facilitate the DOI’s successful performance of its trust responsibilities.<sup>143</sup> The purpose of the Task Force is to “develop and evaluate organizational options to improve the integrity, efficiency, and effectiveness of the . . . Indian Trust Operations consistent with Indian treaty rights, Indian trust law, and the government-to-government relationship.”<sup>144</sup>

The Task Force put forth three potential options for restructuring and reorganization of the Indian trust fund.<sup>145</sup> The three options are:<sup>146</sup> create a new position (Deputy Secretary for Indian Affairs) that would be responsible for all Indian related functions within the Department of the

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D. [E]stablish management objectives for the funds and assets held in trust;

E. [D]efine critical values of the Indian tribe and provide identified management objectives;

F. [I]dentify actions to be taken to reach established objectives;

G. [U]se existing surveys, documents, reports and other research from federal agencies, tribal community colleges, and land grant universities; and,

H. [B]e completed within three years [after the start of activity] to establish the plan.

*Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Tribal Leader/Department of the Interior Task Force on Trust Reform Report For the Secretary of the Interior* [hereinafter *Tribal Leader/DOI Report*], available at <http://www.doi.gov/news/finaltrfreport.html> (June 4, 2002). The Task Force is composed of numerous DOI officials and tribal leaders that “represent a broad cross-section of tribal interests.” *Id.* § 3.

142. *Norton Accepts Proposal on Indian Trust Reorganization: Tribes to Study Task Force’s Plans*, WASH. POST, June 5, 2002, at A21. The primary concern of the Task Force is the development of alternatives to the Bureau of Indian Trust Asset Management (BITAM) that was initially proposed by the DOI in November 2001. *Tribal Leader/DOI Report*, *supra* note 141, § 1.

143. *Tribal Leader/DOI Report*, *supra* note 141, § 1.

144. *Id.* § 2.

145. *Norton Accepts Proposal*, *supra* note 142.

146. *Id.*

Interior;<sup>147</sup> divide the BIA into several different organizations to handle varying trust fund related needs;<sup>148</sup> or create a new position that would combine the aforementioned options.<sup>149</sup>

Opposing the plan put forth by the tribal task force, the plaintiffs in *Cobell* argued for placement of the IIM trust in the care of a receiver appointed and supervised by a federal court.<sup>150</sup> The receiver would operate under, and report to, the judicial branch.<sup>151</sup> This recommendation requires a high degree of judicial oversight and activism and would place the responsibilities of the court-appointed receiver at the level of trustee-delegate.<sup>152</sup>

Utilizing an alternative structure outside the Department of the Interior to reform BIA and the Indian Trust Management Programs presents a third potential option.<sup>153</sup> This proposal, advocated by former Special Trustee for American Indians, Paul M. Homan, primarily focuses on “establishing an independent government sponsored enterprise to manage the U.S. Government’s trust management responsibilities,”

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147. *Tribal Leader/DOI Report*, *supra* note 141, § 7. The Task Force concluded that this option would allow for more manageable control, “provide[] clear lines of authority over all trust functions, improve[] coordination with other Departmental Bureaus, and ensure[] consistent policy of American Indian and Alaska Native Affairs.” *Id.* Several of this proposal’s disadvantages include difficulty in obtaining sufficient support, recruitment, and confirmation of the proposed Deputy Secretary, and inconsistency with the Indian Reorganization Act. *Id.*; see *supra* notes 107-108 and accompanying text. This proposal may have been rooted in a previous attempt by Secretary Norton to create a new Bureau of Indian Trust Asset Management that would operate separately from the BIA. Ellen Nakashima, *Norton Plan for Indian Trusts Meets With Skepticism on Hill*, WASH. POST, Feb. 7, 2002, at A23.

148. *Tribal Leader/DOI Report*, *supra* note 141, § 7. This proposal would regroup the BIA into three separate functional units to handle education, trust funds and trust resources, and trust services. *Id.* By implementing this proposal, the Task Force believes that it would enable the BIA to “increase management attention to key trust responsibilities,” provide for a “[f]lexible organizational structure,” “[i]mprove[] program focus and accountability,” and provide for better coordination between the BIA, Bureau of Land Management, and Minerals Management Services. *Id.* One disadvantage cited by the Task Force is a perception that Indian services may be fragmented. *Id.*

149. *Id.* This proposal would create an Undersecretary of Indian Affairs and would group BIA functions into “logical units.” *Id.* The Task Force cites numerous advantages to this proposal including: better coordination of all Native American functions within the DOI, the Under Secretary as a “single executive sponsor,” and the fact that the “Under Secretary position [would be] more likely to be approved (versus Deputy Secretary position).” *Id.* See *infra* note 142 and accompanying text. The only disadvantage cited by the Task Force with respect to this proposal is the difficulty in recruiting and confirming an Under Secretary. *Tribal Leader/DOI Report*, *supra* note 141, § 7.

150. *Indian Trust*, *supra* note 79.

151. *Id.*

152. *Id.*

153. *Hearing*, *supra* note 96 (statement of Paul M. Homan, Former Special Trustee for American Indians).

including "trust resource management, trust funds management and land title and records management . . . ." <sup>154</sup>

## VI. PATHWAY TO REFORMATION

### A. Settlement

The DOI's 2001 budget contained instructions from lawmakers stating that the "problems with the accounts would be 'best worked out through a negotiation and settlement process.'" <sup>155</sup> This remains true today. Chris Changery, spokesman for Senate Indian Affairs Committee Chairman Ben Nighthorse Campbell, provided what appears to be a common sentiment regarding a proposed settlement: the millions of dollars currently being spent to defend the DOI would be more efficiently used in reforming the trust system. <sup>156</sup>

In determining an appropriate settlement amount, Congress has urged that the government utilize a statistical sampling. This would require an outside firm to analyze approximately 350 accounts in order to determine how much the government owes all Indian account holders. <sup>157</sup> The sampling approach has received strong opposition by the majority of IIM account holders who prefer that the government research each individual

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154. *Id.* at 6.

155. Matt Kelley, *Congress Presses for Potential Multi-Billion-Dollar Settlement of Indian Trust Fund Suit*, ASSOC. PRESS, Oct. 26, 2000.

156. *Id.* (noting that the 2001 DOI budget set aside 27.6 million for the lawsuit and more than \$80 million on "related programs to clean up mismanagement of the accounts"). *Id.* Kevin Gover, head of the Interior Department's Bureau of Indian Affairs, stated that one reason that settlement negotiations have not been fruitful was due to individuals within the DOI and Department of Justice that "don't really want to settle." *Id.* Plaintiffs in the *Cobell* suit have alleged that the earlier settlement negotiations failed due to the government's unwillingness to keep confidential the plaintiffs' expert preliminary analysis of the amount owed to the IIM account holders. Ellen Nakashima, *Panel Criticizes Indian Trust Plan: House Members Worry U.S. Won't Fully Account for Assets*, WASH. POST, Mar. 22, 2001, at A27. Jim McTague, *Indian Fund Settlement Seen Biggest Since S&L Bailout*, BARRON'S (Oct. 16, 2000) (noting Congress' recent appropriation of \$27 million to fund the lawsuit against the DOI, and the sentiment in Congress that the "government has been wasting millions of dollars on the lawsuit and that it ought to stop now." *Id.* McTague's article also compared the current state of the Indian trust fund to the savings and loan scandal of the 1980s in which the federal government paid \$160 billion to bailout the industry. *Id.* Matt Kelley, *Gov't Mismanaged Indian Accounts*, ASSOC. PRESS (Jan. 24, 2001) (noting that settlement negotiations fell through in the fall of 2000 due to the Justice Department's unwillingness to utilize the sampling proposal).

157. Kelley, *Gov't Mismanaged*, *supra* note 156. The sampling approach was approved by then-Secretary of the Interior Bruce Babbitt as a cost-effective means of determining how much the government owes the IIM account holders. *Id.* The project was reported to cost approximately \$70 million and would rely on data outside the sample accounts (oil well production records) in order to determine an accurate figure for settlement. *Id.*

account in order to reach an appropriate figure for settlement.<sup>158</sup> Little progress has been made, to date, with respect to reaching a settlement agreement. Therefore, settlement negotiations, as opposed to litigation tactics, need to be made a priority by DOI and DOJ officials. The sooner a settlement is reached, the sooner full attention can be focused on reforming the trust system.

### B. Receivership

Plaintiffs in the *Cobell* litigation urged the court to appoint a receiver over the IIM trust accounts to provide some type of equitable relief and quantifiable trust reform.<sup>159</sup> In determining the viability of appointing a receiver, it is necessary to consider the degree to which the existing entities have been successful in their reform efforts. Judge Lamberth's most recent contempt opinion provides that the "appointment of a receiver should be the remedy of last resort," and that less drastic remedies should be pursued if they exist.<sup>160</sup> If it is determined that further injunctions or contempt proceedings will not lead to compliance, the court may be justified in resorting to receivership.<sup>161</sup> Given DOI and Treasury's utter failure to comply with their fiduciary responsibilities, it seems apparent that appointment of a receiver is justified, and if nothing more, would at least prevent the DOI from spending additional taxpayer

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158. *Id.* Congress is not likely to endorse this approach, as it would require the BIA to double its two billion dollar budget for an unknown period of time. *Id.* Joseph S. Kieffer III, the court monitor appointed by Judge Lamberth commented that the statistical sampling approach proposed by Babbitt was "a sham to make it appears that work was proceeding." Bill Miller, *Interior Faulted on Indian Trusts: Monitor: Government Staling Reform of Mismanaged System*, WASH. POST, July 12, 2001, at A25. Furthermore, Kieffer alleged that the sampling proposal had already been approved by Babbitt and other high-ranking Interior officials when the DOI conducted a number of meetings with Native Americans across the country in order to determine what type of accounting proposal they felt would work best. *Id.*

159. *Cobell v. Norton*, 226 F. Supp. 2d 1, 134 (D.D.C. 2002); see also Bill Miller, *Indian Trust Reform Still Mired, Watchdog Says; Receivership Urged for Interior Program*, WASH. POST, Sept. 18, 2001, at A29 (highlighting a September 2001 report by the *Cobell* court monitor indicating that DOI managers "'failed to provide a truthful, accurate and complete picture' of the status of reforms"). According to *Cobell*'s Attorneys, this report helps lay the "groundwork . . . for why a receiver is necessary." *Id.*

160. *Cobell*, 226 F. Supp. 2d 1, 146 (D.D.C. 2002). Judge Lamberth cited *Newman v. State of Alabama*, 466 F. Supp. 628 (D.C. Ala. 1979), which provides that when considering the use of a receiver, the court should evaluate whether or not further injunctions or contempt proceedings will accomplish the task of compliance. *Id.*

161. See also John J. Fialka, *Judge Holds Interior Secretary In Contempt Over Indian Trust*, WALL ST. J., Sept. 18, 2002, at A6.



dollars<sup>162</sup> on a reformation process that has been described as “the gold standard for mismanagement by the federal government.”<sup>163</sup>

*C. Alternate Reform Structures Managed and Implemented Outside the DOI*

In light of the utter failure on behalf of the Department of the Interior to bring about any type of substantive change, it has become more and more difficult to find a viable solution to the IIM trust problems within the DOI and BIA. Special Trustee for American Indians, Paul Homan, put forth a proposal that would eliminate the managerial incompetence, mismanagement, and neglect that has characterized the DOI's handling of the IIM accounts. Homan proposes that the DOI be eliminated from the picture.<sup>164</sup> Homan recommends that Congress establish “an independent government sponsored enterprise to manage the U.S. Government's trust management responsibilities.”<sup>165</sup>

An independent, government-sponsored entity would be far better suited to handle the complexities of the IIM trust fund for two reasons. First, the government would be able to locate and hire professionals that have the requisite knowledge and skill level that proper IIM management demands.<sup>166</sup> Professionals with strong backgrounds in banking and the operation of financial institutions, familiar with the “exacting fiduciary standards required in today's modern trust environment,” are far better suited to handling the problems currently associated with the IIM accounts than unskilled DOI staffers.<sup>167</sup> It is perplexing that no other proposal accounts for what Homan finds the

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162. It is reported that since the mid-1990s Congress has spent approximately \$614 million dollars in an attempt to streamline the trust reform system. John J. Fialka, *Babbitt Misled Judge About New System For Indian Funds in '99, Report Alleges*, WALL ST. J., Aug. 10, 2001, at A10. Special monitor Joseph S. Kieffer III recently referred to the trust system as potentially unsalvageable. See Bill Miller and Ellen Nakashima, *Interior Dept. Misled Court On Reforms, Report Says*, WASH. POST, Aug. 10, 2001, at A23. Keiffer's comments were directly at the \$40 million TAAMS system, the centerpiece of the trust reform effort). *Id.*

163. *Cobell*, 226 F. Supp. 2d 1, 11 (D.D.C. 2002).

164. *Hearing*, *supra* note 96 (statement of Paul M. Homan, Former Special Trustee for American Indians).

165. *Id.* at 10.

166. *Id.* at 7. Paul Homan discussed the fact that the DOI, “does not have the will or ability to address the “mismanagement” issues and force out the incompetent managers at BIA, nor is the Department likely to attract competent managers willing and able to undertake a timely reform effort within the Department of the Interior.” *Id.* at 8.

167. *Id.* at 4. Homan explains the primary cause of the trust mismanagement problems as a “lack of competent managerial resources,” and the fact that the BIA and DOI have “virtually no effective knowledge or practical experience with the type of trust management policies, procedures, systems and best practices” which are standard in the “private sector trust departments and companies.” *Id.*

primary cause of trust mismanagement and neglect—unqualified management.<sup>168</sup>

Second, the creation of an independent government-sponsored entity would eliminate the intricate and complex coordination and difficult decision-making that are “inherent in the BIA organizational culture.”<sup>169</sup> An independent, government-sponsored entity can be structured in a manner that minimizes decision-making and management problems and, in turn, provides a more efficient and cost-effective method of IIM management.<sup>170</sup> By removing IIM trust management to an entity outside the DOI, the federal government could eliminate the underlying decision-making and management issues that have plagued the DOI and BIA in their efforts to bring about any type of substantive reform of the trust system.

### CONCLUSION

It is well established that the federal government is responsible for the current state of the IIM trust fund accounts. For the past one hundred years, the federal government failed to comply with its fiduciary responsibilities, disputing the underlying facts and laying blame on others. The time for an equitable solution has arrived.

Former Special Trustee for American Indians, Paul Homan, relayed his sentiment succinctly:

The BIA’S mismanagement of the Indian trusts . . . compares to losses and accounting deficiencies at WorldCom, Global Crossing, Enron and Arthur Anderson. Management has been fired at each one of those bankrupt institutions and most of the staff will lose their jobs. None will survive [its] bankruptcies with a structure anything like [its] pre-bankruptcy structure.<sup>171</sup>

By settling the dispute now, the federal government can focus its attention on the reformation of the trust system, as opposed to fighting a battle that it will not win.

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168. See *supra* notes 132-36 and accompanying text (discussing the tribal task force proposals and the McCain, Daschle, Johnson Discussion Bill’s lack of emphasis on managerial competence or staff skilled in complex trust management responsibilities).

169. *Hearing, supra* note 96, at 5 (Statement of Paul M. Homan, Former Special Trustee for American Indians) (clarifying that transfer to an entity outside the DOI would remove the bureaucratic mess that is associated with the management and decision-making process underlying the IIM accounts).

170. See *id.* This approach would allow for the independent entity to utilize the past failures (and successes) of the DOI, Treasury, and BIA in implementing a new, streamlined approach to management, as opposed to relying on the same ineffectual reformation approaches that have been undertaken within the DOI. See *id.*

171. *Id.* at 9.

## ADDENDUM

Subsequent to the writing of this Comment the district court issued a structural injunction setting forth a detailed timetable for DOI to follow in order to comply with its fiduciary duties associated with the IIM accounts.<sup>172</sup> The injunction is currently on appeal in the United States Court of Appeals for the District of Columbia.<sup>173</sup>

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172. *Cobell v. Norton*, 283 F. Supp. 2d 66 (D.D.C. 2003) (Order Issuing Structural Injunction); *See also id.* at 66 (Memorandum Opinion: "Fixing the System"); *id.* at 66 (Memorandum Opinion: "Historical Accounting").

173. *Cobell v. Norton*, 2004 WL 210700 (D.C. Cir. Jan 28, 2004) (NO. 03-5262, 03-5314) (Order).